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NO. 94-2099

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

THE CITY OF HOUSTON, ET AL.,
Petitioners,
v.
HARRIS COUNTY OUTDOOR ADVERTISING ASSOCIATION, ET AL.,
Respondents.

Petition for Writ of Certiorari To the Texas Court Of Appeals

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Did the Texas Court of Appeals incorrectly decide an important issue of federal law, in a manner contrary to the United States Supreme Court precedent when it affirmed the judgment of the trial court holding that Defendants had violated Plaintiffs' rights to procedural due process under the Fourteenth Amendment?

2. Were there any other grounds adequate to support the Texas Courts' judgments under 42 U.S.C. §1983 or the award of attorney's fees under 42 U.S.C. §1988?

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PETITION FOR WRIT OF CERTIORARI TO THE TEXAS COURT OF APPEALS

RESPONDENTS' BRIEF IN OPPOSITION

To the Honorable Supreme Court of the United States:

The Harris County Outdoor Advertising Association, et al. ("Plaintiffs"), Respondents herein, file their response to the Petition for Writ of Certiorari filed by the City of Houston, et al. ("Defendants"), Petitioners herein, and respectfully present as follows:

STATEMENT OF THE CASE

The trial court in this case initially determined that the so called permit fees imposed by Defendants on Plaintiffs were in actuality occupation taxes that violated the Texas Constitution. The trial court also found that Defendants assessed and collected the unlawful occupation

tax on Plaintiffs without providing either a pre-deprivation or a post-deprivation remedy including "clear and certain" relief from the unlawful taxes paid. On authority of *McKesson v. Division of Alcoholic Beverage & Tobacco*, 496 U.S. 18 (1990), the trial court concluded that this failure to offer meaningful relief from the unlawful taxes violated Plaintiffs' procedural due process rights under the Fourteenth Amendment to the United States Constitution. This finding of a federal constitutional deprivation without adequate state remedy was the basis for Plaintiffs' recovery under the Civil Rights Act, 42 U.S.C. §§ 1983 and 1988. The trial court's decision was affirmed by the Texas Fourteenth Court of Appeals, *Harris County Outdoor Advertising Ass'n v. City of Houston*, 879 S.W.2d 322 (Tex. Civ. App.—Houston [14th Dist.] 1994, writ denied), and the Supreme Court of Texas declined to review the case.

It is undisputed that the appellate court's finding that the Defendants assessed an unlawful occupation tax is a state law question beyond this Court's review, and Defendants in fact do not seek review of this issue. Instead, they challenge the trial court's findings that Defendants violated Plaintiffs' federal constitutional rights to procedural due process.[1]

Close reading of Defendants' Petition for Writ of Certiorari shows that, contrary to their contention that the appellate court's decision "incorrectly resolved an important issue of federal law," Petition for Writ of Certiorari (hereinafter "Petition") at 5, Defendants contend that the appellate court misinterpreted Texas law when it held that there was no adequate state remedy providing "clear and certain" relief from the unlawful taxes. Petition at 9 (stating

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1 **The trial court also found that Defendants violated Plaintiffs' rights to substantive due process, First Amendment rights to free speech and free press, and equal protection of the laws. Petition at 54a-55a.**

that "it is clear that the State of Texas recognizes the right of a taxpayer to seek a refund of unlawfully assessed municipal taxes."). Because of this incorrect reading of state law, Defendants argue, the appellate court reached the wrong *result* after applying the *McKesson* test.

The appellate court's holding that Texas has neither a pre-deprivation nor a post-deprivation procedure for Plaintiffs to obtain a refund of the unlawful taxes rests on independent and adequate state grounds. Furthermore, the argument that Texas in fact has such procedures was not raised by Defendants until the Motion for Rehearing in the appellate court, and was therefore neither pressed nor passed upon below. Finally, the trial court was correct in concluding that Defendants also violated Plaintiffs' rights to free speech and freedom of the press under the First Amendment and substantive due process and equal protection of the laws under the Fourteenth Amendment. For these reasons, this Court should deny Defendants' Petition for Writ of Certiorari.

REASONS WHY THE WRIT SHOULD BE DENIED

I.

THE APPELLATE COURT'S DECISION THAT THERE WAS NO "CLEAR AND CERTAIN" RELIEF AVAILABLE TO THE PLAINTIFFS IS SUPPORTED BY ADEQUATE AND INDEPENDENT STATE GROUNDS

Defendants contend that this Court should grant certiorari because the appellate court below misapplied this Court's holding in *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco*, 496 U.S. 18 (1990). Petition at 6. However, close analysis of the Petition reveals that

Defendants are actually using this contention in an improper attempt to persuade this Court to review and reverse the appellate court's finding under Texas law that the Defendants failed to provide any remedy to Plaintiffs for the unlawful occupation tax. Indeed, even the Defendants admit that the procedural due process claim turns on a question of state law. Petition at 8-9. When stripped of all pretense that this case raises important federal issues, the Defendants in the end argue that the appellate court reached the wrong result under *McKesson* because it incorrectly decided a question of state law. Because this Court has historically declined to review questions of state law, see *Mullaney v. Wilbur*, 421 U.S. 684, 691 (1975) (holding that the state courts "are the ultimate expositors of state law"), the Court should deny the Petition for Writ of Certiorari.

(a) ***McKesson* requires taxpayers be given a "clear and certain" remedy for unlawfully assessed taxes.**

When a state places a taxpayer under duress promptly to pay a tax when due, the Fourteenth Amendment Due Process Clause requires that state to provide a fair opportunity for a taxpayer to challenge the accuracy and legal validity of the tax obligation and a "clear and certain remedy" for any erroneous assessment. *McKesson*, 496 U.S. at 39. Federal law provides flexibility to the states, allowing them to craft a remedy featuring either a pre-deprivation procedure, a post-deprivation procedure, or a hybrid between the two. *Reich v. Collins* , ___ U.S. ___, 115 S.Ct. 547, 550 (1994). However, the state must meet *McKesson's* two-pronged test by (a) providing a remedy to challenge the tax that (b) offers "clear and certain" relief should the tax prove to be excessive or unlawful. *McKesson*, 496 U.S. at 39. What remedy the state provides, if any, requires an interpretation of state law, see *Reich*, ___ U.S. ___, 115

S.Ct. at 550, while the inquiry into whether that remedy provides the constitutionally mandated "clear and certain" relief is a federal question. *See Montana National Bank of Billings v. Yellowstone County*, 276 U.S. 499, 504 (1928) (holding due process gives taxpayers "an undoubted right to recover" unlawful tax funds exacted by duress).

(b) The appellate court's holding that Plaintiffs had no meaningful opportunity to obtain "clear and certain" relief is based on state, not federal law.

Here, the appellate court opinion turned on the initial inquiry in the *McKesson* analytical framework: Did the Defendants offer Plaintiffs some form of remedy for the unlawful occupation tax? The appellate court, interpreting the state law bearing on the question, correctly answered in the negative.[2] *See Harris County Outdoor Advertising*

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2 Throughout the trial in the case and on appeal, Defendants' sole argument opposing Plaintiffs' request for relief under 42 U.S.C. §§ 1983 and 1988 was that funds at issue were not excessive nor collected unlawfully. However, in their Motion for Rehearing to the Texas Court of Appeals, Defendants raised for the first time the defense that *Crow v. City of Corpus Christi*, 209 S.W.2d 922 (Tex. 1948) should be construed as offering Plaintiffs a constitutionally adequate state remedy for the unlawful taxation. Texas law, however, mandates that defenses not raised before the trial court are waived on appeal. *Larsen v. FDIC/Manager Fund*, 835 S.W.2d 66, 74 (Tex. 1992) (holding the FDIC may not raise the *D'Oench* doctrine on appeal when the issue was not raised at trial); *E. F. Hutton & Co. v. Youngblood*, 741 S.W.2d 363, 364 (Tex. 1987) (holding a stockbroker may not raise assertion that the Texas Deceptive Trade Practices Act was inapplicable to securities transaction for the first time in Second Motion for Rehearing in the Court of Appeals).

Likewise, this Court has held that in cases originating in state court, an asserted federal claim will not be decided by this Court where

Ass'n., 879 S.W.2d at 333. Defendants seek certiorari from this Court to reverse this finding. *See* Petition at 9 (maintaining that "it is clear that the State of Texas recognizes the right of a taxpayer to seek a refund of unlawfully assessed municipal taxes" and that such a remedy is sufficient to meet due process under *McKesson*). However, even they acknowledge that this is a state law issue.

Defendants contention that the appellate court held that *McKesson* requires municipalities to "erect separate, administrative processes allowing regulated entities to challenge the validity of fees and taxes assessed" (Petition at 9) misstates the scope of that court's finding. Indeed, the appellate court's conclusion that "there was neither a pre-deprivation nor a post-deprivation procedure available for [Plaintiffs] to challenge the validity of [the] tax or to obtain 'clear and certain' relief...of the taxes paid," *Harris County Outdoor Advertising Ass'n.*, 879 S.W.2d at 333, not only

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the issue was "not pressed or passed upon below." *McGoldrick v. Compagnie Generale Transatlantique*, 309 U.S. 430, 434-35 (1940). For example, in *Illinois v. Gates*, 462 U.S. 213 (1983), the Court refused to consider the State's assertion that the exclusionary rule should be modified to include a good faith exception where the defendant, at every level of the state court proceedings, (a) raised the claim that the Illinois police had violated his Fourth Amendment rights, and therefore (b) the evidence seized should be excluded, and where the State's only response in opposition was that no Fourth Amendment violation occurred. *Id.* at 220-222. This rule is applicable in this case where Plaintiffs asserted (a) that the off-premise permit fees were, in fact, unlawful occupation taxes, and (b) that Defendants violated their procedural due process rights by denying them a meaningful opportunity to challenge the tax and obtain a refund of any unlawful taxes paid, and Defendants' only response in opposition was that the off-premise permit fees were not unlawful occupation taxes. Because Defendants did not "press" the *Crow* defense to the trial or appellate court below, and those courts did not "pass upon" that question, this Court should decline to consider the argument.

conforms to the breath of potential remedies approved by *McKesson*, but also disputes the existence of the post-deprivation remedy Defendants belatedly assert exists.

Defendants do not contend that the appellate court misapplied *McKesson*, but that it reached the wrong result under *McKesson* because, in their view, it misread or wrongly interpreted a state law issue. Assuming without conceding that this is so, this Court should decline to review the appellate court's decision because that decision is supported by "adequate, and independent" state grounds. *See Michigan v. Long*, 463 U.S. 1032, 1041 (1983).

II.

DEFENDANTS VIOLATED PLAINTIFFS' FIRST AMENDMENT RIGHTS

Even if the trial and appellate courts below erred in finding that the Defendants did not offend Plaintiffs' procedural due process rights by levying and collecting the unlawful tax, the trial court correctly held that the unlawful tax on Plaintiffs' activities constituted a violation of Plaintiffs' First Amendment rights to free speech and freedom of the press.

Despite Defendants' wholly unsupported assertion to the contrary, see Petition at 12, there can be no doubt that Plaintiffs are protected by the First Amendment. *See City of LaDue v. Gilleo*, ___ U.S. ___, 114 S.Ct. 2038, 2041 (1994) ("[S]igns are a form of expression protected by the Free Speech Clause"); *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 524 (1981) (Brennan, J., concurring) (plurality opinion) (observing that a majority of the justices agree that "billboards are a medium of communication warranting First Amendment protection").

The First Amendment prohibits government from singling out protected activity for differential taxation absent a "compelling justification." *Leathers v. Medlock*, 499 U.S. 439, 447 (1991). The Defendants violated Plaintiffs' First Amendment rights by singling them out and levying against them an unlawful occupation tax without such a justification. More specifically, the tax applied only to off-premise sign operators with signs located in the Defendants' jurisdiction. The occupation tax is not the type of general taxation on First Amendment activity that has been approved by this Court. *See Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 586-87 n.9 (1983) (suggesting that subjecting First Amendment activity to a generally applicable sales tax would not be unconstitutional).

Defendants have at no time in this litigation, which began eight years ago, articulated a governmental interest justifying the occupation tax on the off-premise sign industry. As the *Minneapolis Star & Tribune Co.* Court explained, the goal of raising revenue, standing alone, cannot justify special tax treatment for the press, since the government can raise revenue by taxing businesses generally. *Minneapolis Star & Tribune Co.*, 460 U.S. at 586. Without an additional, compelling governmental interest, the tax is no more than a prohibited special tax on an activity protected from special taxation by the First Amendment. Defendants' violated Plaintiffs' First Amendment Rights by imposing and collecting such a tax.

Indeed, despite the lower court rulings to the contrary, Defendants still refuse to accept the trial court's finding that Defendants levied an illegal tax on Plaintiffs. Defendants characterize the First Amendment issue as being whether assessing a different permit fee against off-premise signs than is assessed against on-premise signs offends the First Amendment. Petition at 12. This depiction ignores the

fact that the state courts that have considered this case concluded that Defendants assessed and collected an unlawful tax on Plaintiffs, a conclusion that is not subject to further judicial review. Because this is an unlawful tax case, and not a legitimate permit fee case, *Minneapolis Star & Tribune Co.* applies.

By imposing an unconstitutional occupation tax on Plaintiffs, Defendants have impermissibly burdened an activity protected by the First Amendment without a compelling justification to do so. This justifies the trial court's finding that Defendants' conduct violated Plaintiffs' constitutional rights and supports the award of damages and attorney's fees under 42 U.S.C. §§ 1983 and 1988.

III.

DEFENDANTS DEPRIVED PLAINTIFFS OF EQUAL PROTECTION OF THE LAWS

The Defendants misstate this Court's equal protection jurisprudence by asserting that *Metromedia, Inc.* allows them to levy a "higher permit fee" on off-premise permit owners than on on-premise permit fee owners. This reasoning again reveals the Defendants' misunderstanding of the issue raised in this case, which is: Did Defendants deny Plaintiffs equal protection of the law by levying the unlawful occupation tax against them?

Generally, a tax will survive an equal protection challenge if it rationally relates to a legitimate governmental interest. *Western & Southern Life Ins. Co. v. State Bd. of Equalization*, 451 U.S. 648, 657 (1981). This inquiry ensures (1) that the government has a legitimate purpose for distinguishing among the groups affected by the tax, and (2) that the means chosen to effect that purpose are reasonably

related to it, and are not arbitrary and capricious. *Zobel v. Williams*, 457 U.S. 55, 61-64 (1982).

The tax levied by Defendants on Plaintiffs violates equal protection because it is arbitrary, capricious and contrary to state law. As such, the tax is similar to the tax that was held to violate the Equal Protection Clause in *Allegheny Pittsburgh Coal Co. v. County Comm'n.*, 488 U.S. 336 (1989). In *Allegheny Pittsburgh*, West Virginia landowners challenged the valuation placed on their property by the county assessor on equal protection grounds, contending that the assessment was excessive in light of the assessments placed on comparable surrounding properties. *Id.* at 338-39. The Court noted that a state is not prohibited from taxing different property at a different rate, provided the divisions and burdens are reasonable. *Id.* at 344. *See e.g., Allied Stores v. Bowers*, 358 U.S. 522, 526-27 (1959) (holding states may "impose different specific taxes upon different trades and professions and may vary the rate of excise upon various products").

However, the West Virginia Constitution provided that the landowners' property must be taxed at a uniform rate throughout the state according to market value. *Allegheny Pittsburgh Coal Co.*, 488 U.S. at 345. The Court found it significant that the West Virginia tax assessor acted on her own initiative, rather than according to the State's laws or policies, in assessing the landowners' property in a disparate manner. *Id.* at 345-46. Thus, the landowners were denied equal protection by the arbitrary and systematically excessive assessments levied by the tax assessor.

Likewise, the occupation tax levied by Defendants offends equal protection because it was levied arbitrarily, capriciously, and contrary to the law. Even if Defendants

could articulate a legitimate governmental purpose effected by the occupation tax—and Plaintiffs assert that no such legitimate purpose exists—the means chosen to achieve that purpose violate Plaintiffs' right to equal protection of the laws.

IV.

DEFENDANTS VIOLATED THE SUBSTANTIVE DUE PROCESS RIGHTS OF PLAINTIFFS BY ASSESSING A CONFISCATORY TAX

Federal courts have uniformly held that where a fee or tax is so arbitrary and excessive as to be confiscatory of the payor's property, it is invalid as a violation of the Substantive Due Process Clause of the Fourteenth Amendment. *Gwinn Area Community Schools v. State of Michigan*, 741 F.2d 840, 846 (6th Cir. 1984). The occupation tax was imposed in violation of state law, and was excessive in light of the proper and reasonable amount that should have been charged for the off-premise permit. *Harris County Outdoor Advertising Ass'n*, 879 S.W.2d at 332. Defendants charged Plaintiffs $179 for an off-premise operating permit that has a cost of only $19.73, a recovery rate of over 861 percent! Trial Court's Conclusion of Law No. 8. Petition at 54a. Thus, the tax was confiscatory and violative of due process.

V.

THE APPELLATE COURT CORRECTLY ASSESSED COSTS AND ATTORNEY'S FEES AGAINST DEFENDANTS

Defendants violated Plaintiffs' rights under the Procedural and Substantive Due Process Clauses and Equal Protection

Clause of the Fourteenth Amendment, and their First Amendment rights to freedom of speech and freedom of the press. In doing so, Plaintiffs properly recovered damages under 42 U.S.C. §1983. Section 1988 of the Civil Rights Act provides that a party that recovers under 42 U.S.C. 1983 is entitled to recover its reasonable attorney's fees and costs. Because the appellate court below was correct in finding Defendants liable under 42 U.S.C. §1983, the decision to award cost and attorney's fees to Plaintiffs under 42 U.S.C. §1988 should stand.

CONCLUSION

The appellate court decision below correctly interpreted and applied this Court's decisions in determining that Defendants were liable under Sections 1983 and 1988 of the Civil Rights Act. Therefore, this Court should deny the Petition for Writ of Certiorari.

Dated: August 22, 1995
Houston, Texas

Respectfully submitted,

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